United Nations S/2017/180

Security Council

Distr.: General
2 March 2017

Original: English

Letter dated 1 March 2017 from the President of the International Tribunal for the Former Yugoslavia addressed to the President of the Security Council

Pursuant to my responsibilities as President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, I write to report the continued non-compliance of Serbia with its obligations under article 29 of the Statute of the Tribunal, in respect of the pending contempt case against Petar Jojić, Jovo Ostojić and Vjerica Radeta.

You will recall that arrest warrants and orders for transfer of the accused have been pending execution by Serbia since 19 January 2015 and that the failure of Serbia to comply with its obligations was first reported by my predecessor, Theodor Meron, in his letter of 13 October 2015 addressed to the President of the Security Council. The fact that, more than two years later, Serbia has still not executed the arrest warrants is of the utmost concern.

Therefore, following a decision of 14 September 2016 of Trial Chamber I, in which the Trial Chamber formally advised me of the continued failure of Serbia to comply with its obligations under article 29 of the Statute, and pursuant to rule 7 bis (a) of the rules of procedure and evidence of the Tribunal, I hereby place the Tribunal's concerns on record and request that the Security Council take action with regard to this extremely serious matter.

I wish to recall at the outset that Serbia has a duty to cooperate with the Tribunal, pursuant to article 29 of the Statute of the Tribunal, and that this duty undoubtedly applies in contempt matters. In this respect, I draw your attention to the decision of 2 August 2016 of the Trial Chamber in relation to the cooperation of the Government of Serbia with the Tribunal, in which the Trial Chamber affirmed that article 29 of the Statute of the Tribunal created an obligation on States to cooperate with the Tribunal in contempt matters, and it emphasized the following points:

(a) The text of article 29 of the Statute of the Tribunal is not unambiguous, given that it indicates that States must cooperate with the Tribunal in relation to any request for assistance;

(b) The jurisprudence of the International Tribunal for the Former Yugoslavia firmly establishes that the Tribunal's jurisdiction extends to contempt of court, given that the ability to prosecute allegations of contempt is an indispensable element of the Tribunal's ability to effectively adjudicate allegations of serious violations of international humanitarian law;

Please recycle

(c) The explicit incorporation of the crime of contempt within the jurisdiction of the International Residual Mechanism for Criminal Tribunals demonstrates the intention of the Security Council to ensure that the obligation of States to cooperate extends to contempt matters;

(d) Serbia cannot point to its national law in order to justify non-compliance with its international obligations;

(e) Serbia has in the past cooperated on the arrest and transfer of those accused in contempt cases.

As I have noted on previous occasions, any interference with the administration of justice undermines the integrity of the Tribunal's proceedings and has a chilling effect on actual and potential witnesses. It is therefore crucial that the Tribunal be enabled to dispose of the pending contempt case as soon as possible and, most importantly, before the end of its mandate, which is rapidly approaching. Furthermore, I consider that, at this point, all diplomatic channels have been exhausted and that Serbia has been allowed more than sufficient time to fulfil its obligations in the present case.

Indeed, I have repeatedly raised the matter of the failure of Serbia to cooperate, when speaking at the United Nations in my capacity as President of the Tribunal, including in my address to the Security Council on 8 June 2016 and my presentation of the annual report of the Tribunal to the General Assembly on 9 November 2016. The matter was also included in the assessments and reports on the Tribunal of 17 May 2016 (S/2016/454) and of 17 November 2016 (S/2016/976), as well as in my remarks to the Informal Working Group on International Tribunals on 7 December 2016. Subsequently, I again raised the issue in my address to the Security Council on 8 December 2016, in which I urged the members of the Council to ensure that Serbia complied with the Tribunal's orders and abided by its duties under article 29 of the Statute of the Tribunal.

In this respect, I was disappointed by the statement made by the representative of Serbia at the meeting of the Security Council held on 8 December 2016, in which he denied any obligation on the part of Serbia to cooperate with the International Tribunal for the Former Yugoslavia on matters of contempt. I listened carefully as the representative claimed to justify the actions of Serbia by relying on a decision of the High Court in Belgrade issued on 18 May 2016. The representative of Serbia asserted that the Statute of the Tribunal simply did not provide for the surrender of indictees accused of being in contempt of court; that was not written in the Statute. He went on to say that, presumably, if the Council had intended that indictment for crimes other than serious crimes could serve as a basis for extradition, it would have written that into the Statute.

I note that this statement clearly contradicts the legal position that Serbia has previously taken before the Trial Chamber and its past cooperation with the Tribunal in general in matters of contempt. Serbia has previously transferred several persons accused of contempt to the Tribunal, recognizing the Tribunal's authority to dispose of their cases. Furthermore, in January and February of 2016, Serbia was ordered by the Trial Chamber to report on actions taken to execute the arrest warrants against the accused, and it submitted regular reports from February to May 2016. Since then, Serbia has stopped abiding by this duty, but at no point did it raise before the Trial Chamber any question regarding the Tribunal's jurisdiction over contempt matters, even after the Trial Chamber issued its decisions of 2 August 2016 and 14 September 2016.

It is significant that Serbia chose the Security Council as the forum in which to make its new legal position known, and I consider that it would be most regrettable

for its past record of cooperation with the Tribunal to cease in this manner. I recall that the Security Council has in the past played a critical role in supporting the Tribunal on cooperation matters, including in the successful arrest of fugitives. Recently, a majority of members of the Council referred or alluded to the present contempt case during the debate held on 8 December 2016, calling for the strengthening of cooperation and noting that the Tribunal required full cooperation from Member States in order to effectively carry out its mandate. The Tribunal considers that concrete steps should now be taken.

For these reasons, I respectfully call upon the Security Council to ensure accountability, to prevent impunity and to take the measures necessary to secure the compliance of Serbia with all of the Tribunal's orders consistent with its obligation to do so under article 29 of the Statute of the Tribunal. In addition, I appeal to all Member States to execute the international arrest warrants and orders to surrender, as issued confidentially on 5 October 2016 and publicly or in public, redacted form on 29 November 2016, to secure the arrest and transfer of each of the accused.

In closing, I can only reiterate the urgency of transferring and trying the accused. The Tribunal will conclude its work in 2017, with the mandates of the judges expiring on 30 November 2017. It would be a stain on the legacy of the Tribunal, and a lamentable blow to international criminal justice in particular, if the pending case were not heard and concluded before the Tribunal closes its doors. I affirm my previously stated commitment to the Security Council that this contempt matter will not be a reason to prolong the Tribunal's mandate and that the Tribunal stands ready to ensure a speedy and fair trial.

I should be most grateful if you would bring the present letter to the attention of the members of the Security Council and have it circulated as a document of the Council.

(*Signed*) Carmel **Agius**
President